



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

IN THE MATTER OF CLAIM AGAINST THE
DEALER BOND OF JOHN AMATO
OLDSMOBILE MAZDA, INC

Case No. TR-01-0012

FINAL DECISION

Ms. Lonna Williams filed a claim on or about June 7, 2000, with the Wisconsin Department of Transportation (the "Department") against the motor vehicle dealer bond of John Amato Oldsmobile-Miata, Inc. (the "Dealer"). The claim, along with the documents gathered by the Department in its investigation, was referred to the Division of Hearings and Appeals for hearing. The undersigned gave the parties until April 23, 2001, to file any additional information they wished to have considered in issuing a preliminary determination in the matter. Ms. Williams submitted a letter dated April 4, 2001, which included a copy of her letter dated January 7, 2001, related to the claim. The Dealer submitted an undated letter on April 17, 2001.

On June 11, 2001, the undersigned issued a Preliminary Determination and informed the parties by letter that if no timely objection to the Preliminary Determination were received by July 11, 2001, that the Preliminary Determination would be subject to adoption as the Final Decision in the matter. The undersigned has not received any objections to the Preliminary Determination. Accordingly, the Preliminary Determination is adopted as the final decision of the Department of Transportation pursuant to Wis. Adm. Code § Trans 140.26(5)(d).

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the parties to this proceeding are certified as follows:

Ms. Lonna Williams
49 Birch Chase Road
Riverdale, GA 30274

Capitol Indemnity Corporation
P.O. Box 5900
Madison, WI 53705-0900

John Amato Oldsmobile-Mazda, Inc.
8301 N. 76th Street
Milwaukee, WI 53223-3207

FINDINGS OF FACT

1. John Amato Oldsmobile-Mazda, Inc. (the "Dealer") is a motor vehicle dealer licensed by the Department pursuant to Wis. Stat. § 218.0111 (1999-2000). The Dealer's facilities are located at 8301 N. 76th Street in Milwaukee, Wisconsin.

2. The Dealer has had a surety bond in place from January 1, 1994 to the present from Capitol Indemnity Insurance Company, bond number 579114.
3. On November 11, 1999, the Dealer acquired a 1998 Chevrolet Cavalier, VIN 1G1JC5246W7288043 (the "Vehicle") at an auction, with an odometer reading of 26,285 miles. The record does not reflect what the Dealer paid for the Vehicle.
4. On November 16, 1999, the Dealer prepared a Wisconsin Buyers Guide for the Vehicle. The Buyers Guide showed that the manufacturer's warranty on the Vehicle remained in effect until the earlier of April 29, 2001 or 36,000 miles. In the section of the Buyers Guide pertaining to the Vehicle's general condition, the "No" box was marked in all applicable categories. In the section of the Buyers Guide pertaining to the "Vehicle Equipment Requirements", all boxes were marked "legal", including the entry respecting "Emission Equipment".
5. Sometime after the Dealer acquired the Vehicle, it was damaged in an accident. The Dealer had the Vehicle repaired at a total cost of approximately \$6,069.04. The repair invoices suggest that the right front part of the Vehicle had been damaged.
6. On or about March 31, 2000, Ms. Lonna Williams purchased the Vehicle from the Dealer for a purchase price of \$8,995.00 plus taxes and fees. In connection with the sale, the Dealer also sold to Ms. Williams a service contract with a term of 48 months or 75,000 miles, whichever occurred first, with a deductible amount of \$200.00 per repair visit. The service contract was administered by a third party. The cost of the service contract was \$1,198.00.
7. Ms. Williams paid \$2,000 as a down payment. The Dealer financed the balance of the purchase price, taxes, fees, and the price of the service contract, totaling altogether \$8,849.81, for a period of 60 months at an annual percentage rate of 22.5%. The Dealer assigned the consumer credit contract to AmeriCredit Financial Services, Inc. almost immediately. By letter dated April 6, 2000, Ms. Williams was advised that her first payment would be due to AmeriCredit on May 15, 2000.
8. The mileage on the Vehicle at the time of the sale was 26,714 miles. The Wisconsin Buyers Guide described above, which had been prepared about four months before the Vehicle had suffered substantial damage, was the only Buyers Guide prepared on the Vehicle.
9. The Dealer did not inform Ms. Williams that the Vehicle had been in an accident or that the Dealer had caused the resulting damage to be repaired. Ms. Williams made it known to agents of the Dealer that she did not want a car that had been in an accident. Before the sale the Dealer did not disclose that the Vehicle had been in an accident, but rather simply affirmatively represented that there was "no frame or structural damage apparent" to the Vehicle.
10. The damage to the Vehicle and its repair at a cost of over \$6,000 was material information. It was information that a reasonable buyer would attach importance to its existence and which a reasonable seller would know or have reason to know that the buyer would regard as important. If Ms. Williams had known of the damage and repair to the Vehicle, she would not have purchased it, at least not on the terms that were agreed.

11. At the time of the purchase, the “evaporator vent solenoid” was missing. This caused the Vehicle to lack the air pollution control equipment required by Wis. Admin. Code § Trans 305.20(7) for the Vehicle to be operated lawfully on the state’s highways. On April 21, 2001, this was repaired at no expense to Ms. Williams. The Wisconsin Buyers Guide inaccurately represented the emission equipment to be “legal”. This constituted a violation of Wis. Admin. Code § Trans 139.04(6). This violation, however, did not result in an actual loss to Ms. Williams, because the Dealer repaired the item at no cost to Ms. Williams.
12. On April 21, 2000, Ms. Williams had brake service done on the Vehicle at a cost to her of \$34.32. At the time of this repair Ms. Williams had driven the Vehicle approximately 2,438 miles in the three weeks since the purchase. This expense was for regular maintenance and was not caused by any act of the Dealer that would be grounds for suspension or revocation of a dealer license under Wis. Admin. Code § Trans 140.21(1)(c)1.
13. On or about April 21, 2000, Ms. Williams learned that the Vehicle had been damaged and repaired. In the three weeks after the purchase, she discerned a number a problems which she came to believe were related to the accident and repairs, including issues related to the “steering”, “struts”, and the “front-end”. She requested that she be allowed to trade the Vehicle for a similar vehicle. The Dealer offered to allow her to trade the Vehicle for another 1998 Cavalier with less mileage, at an additional cost of \$200.00. Ms. Williams declined the offer.
14. On April 29, 2000, Ms. Williams filed a “Dealer Complaint” with the Department regarding the sale of the Vehicle. As relief she requested that the sale be rescinded and that she be reimbursed for the brake service done on April 21, 2000.
15. By June 8, 2000, Ms. Williams had driven the Vehicle approximately 7,117 miles since the purchase some ten weeks before.
16. On June 8, 2000, the Dealer prepared an offer to effect a rescission of the sale, calculated as follows:

“Vehicle Refund”

\$8,995.00	Price
<u>+ \$503.72</u>	Tax
\$9,498.72	TOT

“Mileage Adjustment”

33,871 miles
<u>-26,714 miles</u>
7,117 miles since purchase
<u>x 10¢ per mile.</u>
\$711.70

“Refund”

\$9,498.72	Vehicle Refund
<u>- \$711.70</u>	Mileage Adjustment
\$8,787.02	Refund

<u>-\$9,041.57</u>	Amount Owed to AmeriCredit till 6/18/00
<u>-\$254.55</u>	Subtotal
<u>+\$525.04</u>	Service Contract Refund
+\$270.49	Net to Ms. Williams

According to the Dealer, the refund of \$525.04 to Ms. Williams for the service contract “would have to be processed by the service contract company.”

17. Ms. Williams rejected this proposed resolution. On June 13, 2000, she filed a bond claim and claimed the following as damages:

Down Payment	\$2,000.00
Sales tax	570.81
Filing fee	4.00
Title application, etc.	82.00
Brake safety service	34.32
Two car payments	498.44
Extended service contract	1,198.00
Loan interest to date	“Unknown”

Thus the total amount claimed on June 13, 2000 was \$4,387.57 plus an unspecified amount of interest.

18. Ms. Williams made only two payments on the Vehicle.

19. In September 2000, AmeriCredit filed a replevin action in Milwaukee County against Ms. Williams (Case number 00SC027133) respecting the Vehicle, alleging Ms. Williams to be in default on her payments. AmeriCredit obtained a default judgment on October 19, 2000, with the order of judgment directing possession and title to AmeriCredit, and awarding a money judgment for costs of \$252. (See Wisconsin CCAP entry for Milwaukee County Case 00SC027133).

20. The complaint in the replevin action alleged that the wholesale value of the Vehicle was \$6,005.00.

21. On October 19, 2000, Ms. Williams amended her bond claim by requesting finance charges of \$6,103.39, making her total claim \$10,490.96.

22. AmeriCredit repossessed the Vehicle, and on December 6, 2000 sold it at a private sale for \$5,000.00. AmeriCredit informed Ms. Williams in a letter dated December 26, 2000 that the total amount she owed under the contract was \$11,332.98, the components of which were as follows:

Principle balance	\$8,849.81
Interest	\$874.59
Plus Late Fees	\$50.00
Plus expenses of repossessing, preparing for sale and selling	<u>\$1,158.58</u>
TOTAL	\$11,332.98

AmeriCredit informed Ms. Williams that she therefore owed a deficiency balance of \$6,332.98 (the difference between \$11,332.98 and \$5,000). There is no evidence that Ms. Williams has paid any part of this amount to AmeriCredit, or that AmeriCredit has commenced an action seeking a judgment on the claimed deficiency.

23. By letter dated January 7, 2001, Ms. Williams amended again her bond claim, requesting the following in additional damages. She claimed that these damages were sustained for the following reason: "Due to the delay in the settlement of the bond claim, I have been ordered to surrender the vehicle to Americredit Financial Services and incurred the following expenses":

Vehicle storage fees	\$600.00 (4 x \$150)
Court costs	164.00
Back payments	996.88 (4 x \$249.22)
Expenses of repossessing, preparing for sale and selling	1,558.58
Loan interest	874.59
Deficiency balance owed	6,332.98
Late fees	<u>50.00</u> (5 x \$10)
Sub Total	\$10,577.03

Ms. Williams stated: "I am asking that you please honor my bond claim for the total amount of \$21,067.99 [\$10,577.03 plus \$10,490.96] so that I may abolish all debt that was accumulated due to the purchase of this vehicle."

24. If the Dealer had disclosed that the Vehicle had been damaged in an accident and that the Dealer had caused over \$6,000 in repair work done on the Vehicle, Ms. Williams would not have purchased it.
25. Ms. Williams' cost for the Vehicle and service contract totaled \$10,849.81. Ms. Williams would not have expended this sum to purchase the Vehicle if the Dealer had informed her that the Vehicle had been in an accident and that the Dealer had caused repairs costing more than \$6,000 to be made on the Vehicle to repair this damage.
26. The wholesale value of the Vehicle in September 2000 was approximately \$6,005. The wholesale value of the Vehicle in December 2000 was approximately \$5,000.00, as reflected by the price received by AmeriCredit at the private sale. I find that the wholesale value alleged in September 2000 in the amount of \$6,005 to be the Vehicle's value to the Dealer.
27. The loss to Ms. Williams caused by the Dealer's failure to disclose the accident damage and repair of the Vehicle is reasonably calculated as the difference between her acquisition cost and the Vehicle's value to the Dealer. This amount is \$4,844.81 (\$10,849.81 less \$6,005.00).
28. Other damages claimed by Ms. Williams are not recoverable in a claim on a dealer bond.
- a. All claims for interest are expressly disallowed under Wis. Admin. Code § Trans 140.21(2)(e).

- b. "Court costs" and "late fees" are expressly disallowed by Wis. Admin. Code § Trans 140.21(2)(e) because they constitute respectively "legal costs" and "penalties".
 - c. Claims for "court costs", "late fees", "expenses for repossession, preparing for sale and selling", and "deficiency balance owed" (the component parts of which include "late fees" and "expenses of repossession") all pertain to Ms. Williams' liability to AmeriCredit. Ms. Williams' default on her obligation under the consumer credit transaction, not any violation of the Dealer, was the direct and proximate cause of any such liability to AmeriCredit. Accordingly, the potential liability reflected by these items were not caused by an act of the Dealer and thus are not recoverable on a claim against a Dealer bond.
 - d. The claim for scheduled payments made or charged to Ms. Williams is not allowable. A portion of these payments constitutes interest costs that are specifically disallowed by Wis. Admin. Code § Trans 140.21(2)(e). The remaining portion of any payment would be applied against the principal amount of the loan. To the extent that Ms. Williams had beneficial use of the Vehicle for the entire time she held title to it, payments on principal would reasonably reflect the benefit she received during the period of her ownership, and thus did not constitute an actual loss to her.
 - e. The claims for storage fees and for the cost of the brake service were not caused by an act of the Dealer for which a dealer's license may be suspended or revoked and are not recoverable.
29. Ms. Williams' bond claim was filed within three years of the ending date of the period the Capitol Indemnity bond was in effect and thus the claim is timely.

DISCUSSION

The procedure for determining claims against dealer bonds is set forth in the Wisconsin Administrative Code at Chapter Trans 140, Subchapter II. Section Trans 140.21(1) provides in relevant part as follows:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01(3)(a)1. to 14., 18. to 21., 25. or 27. to 31., Stats. *[recodified as §§ 218.0116(1)(a) to (gm), (im) to (k), (m), and (n) to (p) in Wis. Stats. (1999-2000)]*.

* * * *

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow a claim, a finding must be made that the Dealer violated one of the sections of § 218.0116(1), Stats., identified in Wis. Adm. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed.

Wis. Admin. Code § Trans 139.04(6)(a)1 requires that a dealer disclose in the Wisconsin Buyers Guide “all material history” of the vehicle. It provides further as follows: “Required disclosure of the history ... is limited to that which the dealer could find using reasonable care.” Section Trans 139.02(10) defines the term “material” as follows:

“Material” means that a reasonable person would attach importance to its existence or a seller knows or had reason to know that a buyer would regard it as important. A seller has reason to know that information is material if a buyer specifically requests the information.

The Dealer’s failure to disclose that the Vehicle had been in an accident and that over \$6,000 in repairs had been done on it was material history of which the Dealer had actual knowledge. This information would have been “material” regardless whether Ms. Williams had made it known to the Dealer that she wished *not* to purchase a vehicle that had been in an accident. Moreover, the materiality of this information is established by definition by virtue of the Dealer’s awareness of Ms. Williams’ wishes in this regard.

The Dealer therefore violated Wis. Admin. Code § Trans 139.04(6) by failing to disclose material history. This constitutes an act for which a motor vehicle dealer license may be suspended or revoked under Wis. Stat. § 218.0116(1)(bm).

The violation caused a loss to Ms. Williams. Had the Dealer not committed the violation, Ms. Williams would not have purchased the Vehicle. Her loss at the time of the sale was the cost of purchasing the vehicle and the service contract -- \$10,849.41.

If Ms. Williams still had title to the Vehicle, she would be entitled to her acquisition cost less any appropriate adjustments upon re-conveying title to the Dealer. Since Ms. Williams no longer has title to the Vehicle, the amount of her damages must be reduced by the value of the Vehicle to the Dealer if Ms. Williams could re-convey title to the Dealer.

The only evidence of the value of the Vehicle is as follows: (1) the retail price of \$8,995 that Ms. Williams paid on March 31, 2000, (2) the wholesale value of \$6,005 alleged by AmeriCredit in its replevin action filed in September 2000, and (3) the \$5,000 that AmeriCredit received in the private sale on December 6, 2000. The wholesale value alleged in September 2000 is closer in time to the violation and is more representative of the Vehicle’s value to the Dealer than the retail price in March 2000, so I conclude that it is the more appropriate valuation. Accordingly, the amount of Ms. Williams’ actual loss caused by a violation of the Dealer is \$4,844.41 (the difference between \$10,849.41 and \$6005).

The Dealer’s violation did not excuse Ms. Williams from meeting her obligation to continue to make payments to AmeriCredit. Any liability that may result from her failure to meet her obligations under the consumer credit transaction were not the direct or proximate

result of the Dealer's violation. This includes her claim for "court costs", "expenses for repossession" and "late fees" (the latter two of which are elements of the claimed "deficiency balance owed"). Moreover, there is no evidence that Ms. Williams has paid any of the deficiency balance claimed by AmeriCredit, or that AmeriCredit has filed an action to obtain a judgment on the claimed deficiency. Consider Wis. Stat. §§ 422.408 and 422.407 (providing that for certain consumer credit transactions, a debtor may assert against the assignee of the rights of the creditor any claims and defenses the debtor may have against the creditor).

The sums that Ms. Williams seeks for monthly payments she has either made or that have been charged to her were not caused by the Dealer's violation. To the extent that the scheduled monthly payments constituted the payment or the accrual of interest on the loan, reimbursement for all interest expense is expressly disallowed as damages in a claim under a dealer bond by Wis. Admin. Code § Trans 140.21(1)(e).

To the extent that scheduled monthly payments constituted payments on the principal of the loan, such principal payments reasonably reflect the benefit Ms. Williams received for her use of the Vehicle during her period of ownership. The Vehicle has been operable at all times, though for some period Ms. Williams chose not to operate it. Ms. Williams had complete use of the Vehicle and in the approximately ten weeks from March 31, 2000 to June 8, 2000, she drove it more than 7,000 miles. (Except for the amount of principal Ms. Williams paid as part of her first two payments, no other payments toward principal were made, but such amounts of unpaid principal would be subsumed in the "deficiency balance owed" to AmeriCredit.)

The claim for storage fees in the amount of \$600.00 were not caused by any violation of the Dealer and thus are not recoverable.

The cost of brake service in the amount of \$34.32 was not caused by any violation of the Dealer and thus is not recoverable. The brakes were serviced after Ms. Williams had driven the Vehicle 2,438 miles. There is no evidence that this service was anything other than regular maintenance or that the Wisconsin Buyers Guide misstated the condition of the brakes at the time of the sale.

The Dealer's misstatement on the Buyers Guide that the emission equipment was "legal" was a violation of Wis. Admin. Code § Trans 139.04(6) but did not cause any loss to Ms. Williams because the Dealer remedied the deficiency at no cost to her.

Ms. Williams was not obliged to accept the Dealer's offer of June 8, 2000 that would have rescinded the sale upon a net amount due to her of \$270.49. Ms. Williams reasonably declined the offer because it would not have made her whole. Assuming that the \$.10 per mile mileage adjustment was reasonable, the offer's treatment of the service contract was still inadequate. The Dealer's offer to reimburse Ms. Williams for about 44% of the cost of the service contract was inadequate. The contract had been in effect for less than three months of its 48-month term, and had been of little or no utility to her during all relevant periods because the manufacturer's warranty remained in effect. Moreover, the Dealer's offer failed to account for the full amount of taxes that Ms. Williams paid or for any of the registration and title fees.

CONCLUSIONS OF LAW

1. Ms. Lonna Williams' claim arose on March 31, 2000, the date she purchased the Vehicle from the Dealer. The surety bond issued to Dealer by Capitol Indemnity Corporation was in effect at this time. The claim arose during the period covered by the surety bond.
2. Ms. Williams filed a claim against the motor vehicle dealer bond of the Dealer on or about June 7, 2000. The bond claim was filed within three years of the last day of the period covered by the surety bond. The claim is timely filed pursuant to Wis. Adm. Code § Trans 140.21(1)(d).
3. Ms. Williams suffered a loss of \$4,844.41 that was caused an act of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license, representing the acquisition cost of the Vehicle and service contract, less the wholesale value of the Vehicle in September 2000. This part of the claim is allowable under Wis. Adm. Code § Trans 140.21(1)(c).
4. The remaining elements of Ms. Williams' claim were not caused by an act of the Dealer that would be grounds for the suspension or revocation of the Dealer's license, and/or are expressly disallowed from recovery in a claim on a dealer bond under Wis. Admin. Code § Trans 140.21(2). Therefore, the remaining parts of the claim are not allowable under Wis. Adm. Code § Trans 140.21.
5. Ms. Williams did not have the duty to accept the Dealer's offer for rescission in satisfaction of her complaint, because the offer would not have made her whole.
6. The Division of Hearings and Appeals has authority to issue the following order.

ORDER

The claim filed by Ms. Lonna Williams against the motor vehicle dealer bond of John Amato Oldsmobile-Mazda, Inc. is ALLOWED to the extent of \$4,844.41. All other aspects of the claim are DENIED.

Dated at Milwaukee, Wisconsin on July 13, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N. 6th Street, Room 92
Milwaukee, Wisconsin 53203-1685
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By: _____

William S. Coleman, Jr.
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.